

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

)	
FIBER TECHNOLOGIES)	
NETWORKS, L.L.C.)	
f/k/a FIBER SYSTEMS, L.L.C.)	D.T.E. 03-56
)	
v.)	
)	
VERIZON NEW ENGLAND, f/k/a)	
NEW ENGLAND TELEPHONE)	
AND TELEGRAPH COMPANY)	
)	
and)	
)	
)	
WESTERN MASSACHUSETTS)	
ELECTRIC COMPANY)	
)	
and)	
)	
MASSACHUSETTS ELECTRIC)	
COMPANY)	
)	

**ANSWER OF WESTERN
MASSACHUSETTS ELECTRIC COMPANY**

Pursuant to 220 CMR 45.05, the Western Massachusetts Electric Company (“WMECO”) files this Answer to the Amended Complaint and Petition for Declaratory Relief filed with the Department of Telecommunications and Energy (“Department”) on May 14, 2003, by Fiber Technologies Networks, L.L.C. (“Fibertech”). As discussed below, the Department should deny Fibertech’s request for interim relief and dismiss its Complaint.

I. INTRODUCTION

As the Department is well-aware based on pleadings filed in D.T.E. 02-47, Fibertech has unlawfully and without authorization attached its fiber optic facilities on hundreds of WMECO's, Verizon Massachusetts' ("Verizon"), and Massachusetts Electric Company's ("MECO") poles in western Massachusetts. Fibertech failed to obtain licenses from WMECO, Verizon, or MECO to attach to their respective poles.

Fibertech's attachments are not only illegal, they create a safety hazard to WMECO's employees and are in violation of the National Electric Safety Code ("NESC"). Fibertech's facilities also put at risk the employees of other companies who attach to the poles as well as the general public. WMECO has notified Fibertech on numerous occasions of these safety violations, but WMECO's concerns have consistently been ignored or dismissed by Fibertech.

In order to address WMECO's safety concerns, enforce WMECO's rights under the License Agreement that WMECO and Fibertech signed, and to prevent Fibertech from making further unlawful and unsafe attachments, WMECO filed suit against Fibertech in Hampden County Superior Court. WMECO sought injunctive relief requiring Fibertech to cease any further unauthorized attachments and to remove the unauthorized attachments that it placed on WMECO's poles. WMECO's Complaint and request for injunctive relief was subsequently joined with a similar Complaint filed in Superior Court by Verizon.

Following oral argument on August 14, 2002, the Superior Court justice entered an order granting the preliminary injunction requests of Verizon and WMECO. See Exhibit 1. The order bars Fibertech from attaching to any poles owned by Verizon or WMECO without express authorization. The order required Fibertech to either 1) remove all attachments and

associated cable within 45 days from all poles owned by Verizon and WMECO for which it has not received an express license or 2) to deliver to Keefe Clemons, attorney for Verizon, within 10 days of the order, \$400,000 which is to be disbursed by Mr. Clemons to pay for the corrections of all attachments which are posing safety hazards as deemed by Verizon and WMECO. Id. pages 10-11. The court found that Fibertech was “committing a continuing trespass” and that Verizon and WMECO established a “very strong likelihood of success on the merits.” Id., pages 5-6. The Court also concluded that it “has jurisdiction to provide injunctive relief against common law trespasses under the circumstances presented here.” Id. page 6. Fibertech paid the \$400,000 to Verizon and the companies used those funds to correct the conditions caused by Fibertech’s illegal, unauthorized, and shoddy attachments.

In apparent response to WMECO’s complaint and request for injunctive relief filed in Superior Court, Fibertech filed a Petition and Complaint with the Department on August 13, 2002, which was docketed as D.T.E. 02-47. Fibertech’s complaint was dismissed without prejudice by the Department on December 24, 2002. However, Fibertech requested reconsideration of the Department’s dismissal. The Department has not yet ruled on this request and, accordingly, the D.T.E. 02-47 proceeding remains pending.

On May 14, 2003, despite the fact that D.T.E. is before the Department, Fibertech filed an Amended Complaint and Petition for Declaratory Relief which essentially makes the same false accusations as the original complaint. Fibertech’s complaint fails to provide any factual support for the outlandish allegations that it makes. Fibertech makes statements about “‘go fish’ schemes” but provides no facts whatsoever in its complaint to back up these statements, nor does it provide an affidavit in support of such allegations.

II. WMECO's ANSWER TO FIBERTECH'S COMPLAINT

Responding to the specific claims set forth in Fibertech's Complaint, WMECO states as follows with respect to each of the numbered paragraphs:

1. WMECO admits that it owns poles.
2. WMECO denies the allegations in this paragraph of the Complaint. Fibertech has provided no facts to support its claims that WMECO has acted in an anti-competitive and discriminatory manner.
3. WMECO denies the allegations in this paragraph of the Complaint. WMECO denies that it responded to Fibertech's applications in 389 days. WMECO responded in a timely manner to Fibertech. It is Fibertech's own ineptness at filing applications for pole attachments and their failure to respond to inquiries from WMECO that caused any delays.
4. WMECO denies the allegations in this paragraph of the Complaint. WMECO denies that it has imposed illegal make-ready charges on Fibertech. WMECO is seeking to enforce the terms of a signed License Agreement in which Fibertech agreed to abide by its terms. All of the make-ready charges imposed by WMECO are applied in a non-discriminatory manner. WMECO has asked Fibertech since July 2002 (see Exhibits 2-5) for information regarding any of WMECO's facilities which may not be in compliance with the National Electric Safety Code so that those deficiencies can be corrected. Fibertech has failed to provide such information.
5. WMECO does not have information sufficient to address the claims of Fibertech in this paragraph of the Complaint.
6. WMECO denies that is imposed unreasonable or discriminatory make-ready demands upon Fibertech.

7. WMECO denies that it did not respond to Fibertech's pole applications in a timely manner. WMECO does not have sufficient information to address Fibertech's rationale for playing games with the pole application process by constantly filing and canceling numerous pole applications.

8. WMECO denies that it forced Fibertech to downsize its network through excessive make-ready charges. The make-ready charges assessed in the towns stated by Fibertech are higher because those towns have two cable companies attached to poles and the cost to move facilities is greater. WMECO denies that the pole attachment process in Massachusetts is exclusionary.

9. WMECO will not address this paragraph of the complaint since it is addressed to Verizon.

10. WMECO denies all of the unsubstantiated allegations. WMECO does admit that its original estimate of make-ready charges was \$231,000.

11. WMECO denies that it caused unreasonable delays or imposed unreasonable terms and conditions upon Fibertech. WMECO cannot respond to the dates that Fibertech illegally and without authorization attached to WMECO's poles because Fibertech never informed WMECO that it had attached. WMECO learned about the attachment by an employee who noticed them a few weeks later. This is the first time that Fibertech has ever informed WMECO of the dates in which it illegally attached to WMECO's poles. WMECO denies that the attachments by Fibertech were done in a safe manner. Fibertech's attachments used lag bolts to attach the extension arms which are not stable and could have caused serious injury to a pedestrian or a WMECO employee who had no knowledge of the Fibertech facilities. Fibertech does admit that it attached prior to seeking Department

resolution of its issues. If Fibertech claimed that WMECO had waited 389 days, then surely Fibertech could have filed a complaint within that period of time rather than taking matters into its own hands.

12. WMECO is without knowledge as to when Fibertech informed Verizon of its installations. As indicated above, Fibertech never notified WMECO of its attachments. WMECO admits that it filed a complaint in state court seeking damages for Fibertech's trespass onto WMECO's property, an action beyond the jurisdiction of the Department. WMECO admits that Fibertech's facilities did pose an immediate threat to line workers trying to navigate the shoddy and unsafe attachment made by Fibertech who were unaware of these facilities. Fibertech was ordered by the Superior Court to remove its network or to pay \$400,000 to correct the unsafe attachments. See Exhibit 1, pp. 10 – 11.

13. WMECO admits that Fibertech's facilities posed four hazards: 1) location of the fiber line closer than 40 vertical inches from electric facilities at the pole; 2) location of the fiber line closer than 30 vertical inches from the secondary electric line at mid-span; 3) the use of extension arms, and 4) the use of boxing. The measuring for clearances under the National Electric Safety Code is done vertically not in the manner in which Fibertech has unilaterally decided that it should be done. Fibertech's incorrect manner of measurement is one reason why they wrongfully contest the clearances that must be maintained under the National Electric Safety Code. WMECO denies Fibertech's allegation that it was denied permission to correct the mid-span violations. WMECO gave Fibertech the opportunity to correct those deficiencies but Fibertech declined.

14. WMECO has no knowledge of these alleged violations. Last July, WMECO asked Fibertech to point out any NESC violations on WMECO's facilities. See Exhibits 2-5.

Fibertech failed to respond. Months later when Fibertech did respond and pointed out very few facilities believed to violate the NESC, WMECO performed an inspection and corrected the facilities, if necessary. Fibertech fails to point out in this paragraph of its complaint that WMECO contests not only Fibertech's violations of the NESC but also the shoddy work in attaching the facilities. The combination of these factors creates the safety hazard.

15. WMECO denies the allegations in this paragraph of the Complaint.

16. WMECO denies the allegations in this paragraph of the Complaint. The costs to correct Fibertech's shoddy attachments did exceed the make-ready estimates originally provided to Fibertech. This is because the work to be performed after Fibertech installed its facilities was no longer make-ready work. The work was now to correct the violations and bring Fibertech's facilities into compliance with the NESC. Such work is greater in scope than simple make-ready work.

17. WMECO has expressed its intention to enforce its rights which are set forth in the pole attachment agreement entered into between WMECO and Fibertech. Fibertech has violated the terms and conditions of that agreement by illegally attaching to WMECO's facilities prior to receiving a license. WMECO disputes the contention of Fibertech that it was authorized to install its facilities on WMECO's poles without first obtaining a license.

18. WMECO denies the allegations in this paragraph of the Complaint as they relate to WMECO's conduct.

19. WMECO does not have sufficient knowledge with respect to the services that Fibertech provides, will provide, or the extent of Fibertech's network.

20. To the best of its knowledge, WMECO believes this to be correct.

21. WMECO's principal place of business is located at 174 Brush Hill Avenue, West Springfield, Massachusetts.
22. To the best of its knowledge, WMECO believes this to be correct.
23. WMECO is a subsidiary of Northeast Utilities System. Northeast Utilities is not a major shareholder in NEON.
24. WMECO is without knowledge as to MECO's affiliation with NeesCom.
25. WMECO believes this statement to be true and correct.
26. WMECO believes this statement to be true and correct.
27. Fibertech is not a licensee. Fibertech was never granted a license by WMECO. Fibertech also was not authorized by the town of Northampton to construct its facilities to the best of WMECO's knowledge. Fibertech has also not provided any documentation to support its claim that it is a "licensee" pursuant to 220 CMR 45.02.
28. WMECO believes this statement to be true and correct.
29. The Department has jurisdiction over pole attachment complaints pursuant to 220 CMR 45.00.
30. WMECO will not address this paragraph of the complaint since it is addressed to Verizon.
31. WMECO believes this to be true and correct.
32. WMECO will not address this paragraph of the complaint since it is addressed to MECO.
33. WMECO accepts the Fibertech's re-statement of the 45-day rule. WMECO is without knowledge as to testimony in Verizon's Section 271 application.

34. WMECO is without knowledge as to the applications submitted to Verizon or as to their response times. WMECO denies that it responded to Fibertech's initial applications after 389 days. WMECO made numerous inquiries for additional information and, in those very few instances where Fibertech provided sufficient information, returned make-ready estimates to Fibertech. Any delays in the process were caused solely by Fibertech's ineptitude at filling out applications, returning phone calls, and providing adequate information. In addition, Fibertech would submit an application for one route, then another with overlapping poles, then withdraw one application, file another, and so on, and so on. In addition, during the Motion to Dismiss argument in Hampden Superior Court on May 21, 2003, the judge asked Fibertech's counsel why it had taken five months to file a new complaint with the Department. Fibertech's counsel explained that surveys and measurements and what not, take time. Fibertech apparently believes that it is sufficient for it to perform a survey in 150 days, but that the utilities should respond with a make-ready estimate in 45 days given their cycle of filing and withdrawing applications and changing routes after applications are filed.

35. WMECO disputes the times set forth in Exhibit F and denies the allegation that the average response time of all the utilities was 162 days. As indicated previously, WMECO responded almost immediately, but Fibertech's failure to respond to WMECO's make-ready estimates and requests for information caused many delays. For example, on November 30, 2001 Fibertech submitted application SPR12-1. WMECO responded on December 17, 2001 with a make-ready estimate. See Fibertech's Exhibit G.

36. WMECO disputes that the make-ready charges were not legal. WMECO contends that if so, Fibertech should have filed a complaint with the Department at the time that it was given the make-ready estimates, not after illegally attaching.

37. WMECO will not address this paragraph of the complaint since it is addressed to Verizon.

38. WMECO will not address this paragraph of the complaint since it is addressed to Verizon.

39. WMECO denies the allegations that its make-ready estimates were “egregiously expensive” or were “discriminatory and unreasonable.” WMECO charged make-ready work where Fibertech’s attachments would result in a violation of the NESC.

40. WMECO denies the assertions made by Fibertech. In the past, only two or three companies were on a pole. That has now changed. Standards have changed due to the increased use of poles. Due to the increased use, safety standards must be enforced to protect the lives of line workers. Fibertech’s facilities were not constructed in accordance with generally accepted construction practices. For example, Fibertech’s facilities used lag bolts on extension arms which create a hazard because they are not securely fastened to the pole. It is like a screw in a pole without a nut. A tree falling on the line could easily pull out the extension arm which could cause severe injury or death to line workers or pedestrians. Also, WMECO does not allow boxing so that its workers can climb the pole on one side free from impediments. WMECO maintains its own safety standards to protect its workers and its customers from injury. For that reason, WMECO believes that Fibertech’s facilities should be in compliance with the NESC.

41. As stated above, WMECO does not allow boxing. Boxing creates a hazard for line workers. Since WMECO consistently does not allow the use of boxing, WMECO denies Fibertech's wild assertions regarding discrimination.

42. WMECO will not address this paragraph of the complaint since it is addressed to Verizon.

43. WMECO denies that its demands for pole replacements were unnecessary.

44. WMECO denies that it allows facilities to be installed if only an inch or two shy of NESC requirements. Fibertech says that there are variances from the NESC based on its own analyses. Any number of factors could lead to a difference of one inch when measuring forty inches straight up including the angle of the measuring tool, wind, and the exact angle of the facilities installed in relation to each other.

45. WMECO denies all the outrageous allegations in this paragraph. WMECO consistently enforces safety issues, including the NESC with all applicants.

46. WMECO agrees generally with Fibertech's characterization of the process. Where it is possible to move existing facilities lower on a pole, WMECO does so to accommodate an attacher. However, there are situations where it is not that simple, such as where facilities cross a street. In those situations it is not always possible to lower existing facilities.

47. WMECO denies the allegations in this paragraph of the complaint.

48. WMECO denies the allegations in this paragraph of the complaint.

49. WMECO denies that Fibertech was required to pay for unnecessary work.

50. WMECO denies the allegations in this paragraph of the complaint. All pole replacements were necessary and justified. WMECO only required pole replacements as a

last resort when there were no other methods of attaching Fibertech's facilities so that they did not pose a hazard to line workers and to ensure compliance with NESC.

51. WMECO denies the allegations in this paragraph of the complaint. This is another instance where Fibertech has taken an example out of context. Fibertech's example provides no information with regards to what is in between the poles or whether a road is under the lines.

52. WMECO denies the allegations in this paragraph of the complaint. All of its required make-ready work was necessary.

53. WMECO denies Fibertech's apparent simplistic justification for moving facilities. As stated earlier, WMECO will move existing facilities where it can do so without creating a safety hazard but will not do so where it is not prudent, i.e. facilities over a road.

54. WMECO required Fibertech to pay for costs necessary to ensure that Fibertech's facilities could be installed pursuant to the NESC.

55. WMECO denies the allegations of this paragraph of the complaint. However, WMECO does agree that it has entered into agreements with Verizon regarding the use of space on some poles. In many instances, WMECO has reserved additional space on poles to ensure that its workers could climb poles safely, without impediment or obstruction. WMECO denies that it has not provided Fibertech with documents revealing the allocation of pole space. On September 30, 2002, representatives of Verizon, WMECO, MECO, and Fibertech attended a meeting in Springfield. During that meeting, WMECO made clear to Fibertech through diagrams and charts the allocation of pole space and that WMECO had reserved additional pole space for safety reasons in some instances.

56. WMECO denies that any of its required make-ready work was improper. As indicated previously, WMECO has purchased additional space on many poles to ensure the safety of its linemen.

57. WMECO is without sufficient knowledge as to the allegations regarding these specific poles. However, if there happened to be a particular pole in which there was a pre-existing condition and it was corrected so that Fibertech could attach in compliance with the NESC, WMECO would have accommodated by correcting the condition. If there happened to be a situation in which there was a pre-existing condition such that even if it were corrected, Fibertech's attachment would create a new violation, Fibertech would be charged the appropriate make-ready charges.

58. WMECO denies the allegations that the make-ready charges for these poles was not properly billable to Fibertech.

59. WMECO denies the allegations in this paragraph of the complaint. WMECO is without knowledge as to rationale behind Fibertech's process of filing, canceling, re-filing, and then canceling again, various pole applications, but does agree with Fibertech that it did file applications in such a haphazard manner.

60. WMECO denies the allegations in this paragraph of the complaint. If Fibertech felt that it was forced to downsize its network due to action by the utilities, it should have filed a complaint with the Department at that time. Fibertech has made no allegations in this complaint of a denial to access of any poles in which it claims its original network was planned.

61. WMECO will not address this paragraph of the complaint since it is addressed to Verizon.

62. WMECO disputes the unsubstantiated amount that Fibertech claims it paid to the utilities for surveys and make-ready costs. WMECO does agree with Fibertech's statement that it "was not expressly authorized to attach to any poles."

63. WMECO accepts that Fibertech engaged in self-help and incorrectly interpreted the Department's 45-day rule. However, WMECO disputes Fibertech's justification for its illegal trespass. Fibertech should have filed a complaint with the Department.

64. WMECO denies the statements in this paragraph of the complaint. Fibertech's facilities were not installed in a manner that would "exceed the quality of standard practice." Fibertech's shoddy attachments which were made without WMECO's authorization or input, could have caused severe injury or death. Fibertech's use of lag bolts is not permitted, nor used by WMECO, because such bolts do not provide stability and can be pulled out if a tree falls on a line. In addition, Fibertech's measurement of clearances from extension arms is not in accordance with acceptable engineering practices. In accordance with acceptable engineering practices, measurements must be taken vertically and not at an angle. It is the vertical measurement that determines compliance with the NESC.

65. WMECO is without knowledge as to the assertions in this complaint since they pertain to Verizon. However, WMECO points out that it has never received a letter from Fibertech informing it that Fibertech has attached to WMECO's poles.

66. WMECO will not address this paragraph of the complaint since it is addressed to Verizon.

67. WMECO admits that it filed a complaint in Superior Court against Fibertech for its illegal attachments and that such attachments did pose a threat to safety and did pose “an immediate threat of death or severe bodily injury to employees of WMECO and other companies coming in proximity to such lines to service their equipment, and present safety issues to the public at large.”

68. WMECO denies the assertions in this paragraph of the complaint. Fibertech’s facilities were not constructed with industry practices in the “installation of their own facilities.” As indicated previously, WMECO does not use extension arms nor lag bolts. WMECO’s measurements are consistent with acceptable engineering practices and Fibertech’s are not.

69. WMECO denies the assertions in this paragraph of the complaint. The judge did not act because he was “pressed by the utilities.” He acted because he was compelled by the facts presented before him to act in a fair manner given the safety concerns present and the unauthorized trespass of Fibertech.

70. WMECO accepts the facts in this paragraph of the complaint as true. However, WMECO is without knowledge as to the motivation behind Fibertech’s decision to enter into a stipulation with MECO.

71. WMECO is without knowledge as to the assertions in this paragraph of the complaint regarding the results of Fibertech’s survey. The assertions in this paragraph are irrelevant as this does not pertain to any term or condition of attachment.

72. WMECO is without knowledge as to the assertions in this paragraph of the complaint regarding the results of Fibertech’s survey. The assertions in this paragraph are irrelevant as this does not pertain to any term or condition of attachment.

First Affirmative Defense

The Complaint fails to state a cause of action upon which relief can be granted.

Second Affirmative Defense

WMECO, Verizon, and Fibertech have entered into a License Agreement in which all three parties agreed to the rates, terms, and conditions of the contract. The rates, terms, and conditions in the existing contracts are valid, enforceable, and binding on all the parties. Although, the Department has the authority under M.G.L. c. 166, § 25A to regulate the rates, terms, and conditions of a pole attachment agreement in which the parties cannot agree, the Department does not have the authority to abrogate a contract, such as the License Agreement, which has been entered into good faith by all three parties.

Third Affirmative Defense

Fibertech willingly entered into the License Agreements with WMECO and is estopped from recovering such relief because of its actions.

Fourth Affirmative Defense

Fibertech is not without fault with respect to the allegations in this Complaint, and is therefore not entitled to any relief.

Fifth Affirmative Defense

The Department does not have the authority to direct WMECO to issue written licenses nor direct WMECO to recognize the licensure of the Fibertech's facilities on the poles in question.

WHEREFORE, for the reasons set forth above, WMECO respectfully requests that the Department deny all of Fibertech's prayers for relief and dismiss its Complaint.

Respectfully submitted,

Western Massachusetts Electric Company

By its attorneys,

Stephen Gibelli, Counsel
107 Selden St.
Berlin, Connecticut 06067
(860) 665-5513

Stephen Klionsky, Senior Counsel
101 Federal St., 13th Floor
Boston, Massachusetts 02110
(617) 748-5140

Dated: May 28, 2003